

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
DATARADIO CORPORATION)
)
Emergency Petition for Waiver of Section 90.547)
of the Commission's Rules)

ORDER ON RECONSIDERATION

Adopted: December 6, 2001

Released: December 10, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

1. *Introduction.* On December 14, 2000, Dataradio Corporation (“Dataradio”) requested reconsideration¹ of a decision by the Public Safety and Private Wireless Division (“Division”) Wireless Telecommunications denying Dataradio’s request for an emergency waiver Section 90.547 of the Commission's Rules, 47 C.F.R. § 90.547. Specifically, Dataradio seeks to manufacture mobile and portable transmitters that are incapable of operating on the narrowband nationwide Interoperability channels in the 764-776 MHz and 794-806 MHz bands (collectively, the 700 MHz band).² For the reasons stated below, we deny Dataradio’s Petition.

2. *Background.* On September 29, 1998, the Commission established a band plan and adopted service rules for the public safety 700 MHz band.³ The Commission apportioned the 700 MHz band use designations for General Use, Interoperability,⁴ and reserved for later designation.⁵ At that time, the

¹ Petition for Reconsideration, filed December 14, 2000, by Dataradio Corporation (“Petition”).

² Dataradio Corporation, *Order*, 15 FCC Rcd 22283 (WTB PSPWD 2000) (“*Waiver Order*”). Dataradio develops, manufactures, and implements wireless products and networks supporting data applications for mobile and fixed uses in the public safety and private wireless communities. *Id.* at 22284 ¶ 3.

³ Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *First Report and Third Notice of Proposed Rule Making*, WT Docket No. 96-86, 14 FCC Rcd 152 (1998) (“*First Report*”).

⁴ The term “interoperability” refers to the ability of different governmental agencies to communicate across jurisdictions and with each other. *See id.* at 189-90 ¶ 76.

⁵ *See id.* at 175-76 ¶ 43. The allocation was 52.5% for General Use, 10.8% for Interoperability, and 36.7% held in reserve. *Id.* Subsequent Commission actions expanded band use designations resulting in allocations and designations now being as follows: 52.1% for General Use, 10.8% for Interoperability, 25.0% held in reserve, 10.0% for State License, 0.8% for secondary trunking, and 1.3% for low power. *See* Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010, *Third Memorandum Opinion and Order and Third Report and Order*, WT Docket No. 96-86, 15 FCC Rcd 19844, 19848 ¶ 7 (2000).

Commission required that all narrowband⁶ mobile and portable 700 MHz band public safety radios be capable of operating on all of the narrowband nationwide Interoperability channels.⁷ In addition, it established the Public Safety National Coordination Committee (“NCC”), an advisory committee established under the Federal Advisory Committee Act (“FACA”),⁸ to make recommendations to the Commission regarding technical standards for the equipment operating on the Interoperability channels in the 700 MHz band.

3. On December 20, 1999, Dataradio requested a waiver of Section 90.547 to allow it to manufacture 700 MHz band public safety radios incapable of operating on the narrowband nationwide Interoperability channels.⁹ On February 25, 2000, the NCC submitted its report to the Commission recommending, *inter alia*, digital interoperability standards for both voice and narrowband data communications.¹⁰ On August 2, 2000, the Commission sought comment in WT Docket No. 96-86 on the NCC Report.¹¹

4. On November 14, 2000, the Division released an order denying Dataradio’s request for waiver. The Division analyzed the waiver request under to Section 1.925(b)(3) of the Commission’s Rules, 47 C.F.R. § 1.925(b)(3), which provides that grant of a request for waiver is warranted if (a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant

⁶ The term “narrowband” refers to bandwidth less than or equal to 25 kHz. 47 C.F.R. § 90.531 sets forth the band plan for the 764-776 MHz and 794-806 MHz public safety bands.

⁷ *First Report*, 14 FCC Rcd at 213 ¶ 135; *see also* 47 C.F.R. § 90.547.

⁸ 5 U.S.C., App. 2 (1988).

⁹ At the time of Dataradio’s waiver request and release of the *Waiver Order*, Section 90.547 read as follows: “Mobile and portable transmitters designed pursuant to standards adopted by the National Coordination Committee to operate in the 764-776 MHz and 794-806 MHz frequency bands must be capable of operating on any of the designated nationwide narrowband interoperability channels approved by the Commission.” 47 C.F.R. § 90.547 (1999).

¹⁰ *See* Public Safety National Coordination Committee, Recommendations to the Federal Communications Commission for Technical and Operational Standards for Use of the 764-776 MHz and 794-806 MHz Public Safety Band Pending Development of Final Rules (Feb. 25, 2000) (“NCC Report”).

¹¹ Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010; Establishment of Rules and Requirements of Priority Access Service, *Fourth Notice of Proposed Rule Making*, WT Docket No. 96-86, 15 FCC Rcd 16899 (2000) (“*Fourth Notice*”). With respect to narrowband low speed data transmission standards, the NCC recommended that the Commission adopt the data interoperability standard that is incorporated in the Project 25 suite of standards, and is defined by one American National Standards Institute (“ANSI”) standard and four Telecommunications Industry Association/European Technical Standards Institute (“TIA/EIA”) standards. NCC Report at 21 ¶ 64. Specifically, the Commission’s proposal for interoperability technical standards read as follows: “Transmitters designed for data transmission shall include a 12.5 kHz bandwidth mode of operation conforming to the following standards: ANSI/TIA/EIA 102.BAEA (data overview); ANSI/TIA/EIA 102.BAEB (packet data specification); ANSI/TIA/EIA 102.BAEC (circuit data specification); ANSI/TIA/EIA 102.BAEA (radio control protocol); ANSI/TIA/EIA 102.BAAA-1 (common air interface) for operation in the 12.5 kHz FDM mode. *Fourth Notice*, 15 FCC Rcd at 16932 App. B.

case, and grant of a waiver would be in the public interest; or (b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹² The Division concluded that Dataradio did not demonstrate that grant of its request was warranted under either standard. In this regard, it noted that the rules for public safety use of the 700 MHz band were designed to promote and facilitate achievement of nationwide interoperability. Thus, anything obstructing interoperability capability would undermine the efficiency of the use of the 700 MHz band and the Commission's express goals.¹³ The Division disagreed with Dataradio that granting its waiver request would not impact realization of nationwide interoperability. It stated that granting Dataradio's request would jeopardize the Commission's overall plan to achieve interoperability because entities purchasing non-interoperability capable radios most likely would be reluctant and/or unable to buy compliant radios within a short timeframe.¹⁴ The Division also found that Dataradio's position as a manufacturer of radios was not unique because all manufacturers of radios intended for use in the 700 MHz band are under the purview of Section 90.547, and that Dataradio had reasonable alternatives within the existing Rules.¹⁵ Finally, the Division disagreed with Dataradio that it would be years before digital interoperability standards are approved, because the record showed that the process for establishing such standards was proceeding timely and with reasoned decision-making and administrative due process, as shown by, collectively, the NCC Report and the *Fourth Notice*.¹⁶

5. On December 14, 2000, Dataradio requested reconsideration of the *Waiver Order* to the extent it relates to data-only radio systems.¹⁷ Com-Net Ericsson Critical Radio Systems ("Com-Net Ericsson") filed comments in support of Dataradio's Petition.¹⁸

6. Dataradio also filed comments in response to the *Fourth Notice*. On January 17, 2001, the Commission released the *Fourth Report and Order* in WT Docket No. 96-86.¹⁹ The Commission adopted

¹² *Waiver Order*, 15 FCC Rcd at 22284 ¶ 4.

¹³ *Id.* at 22285 ¶ 7.

¹⁴ *Id.* at 22287 ¶ 11.

¹⁵ *Id.* at 22288 ¶ 13.

¹⁶ *Id.* at 22288-89 ¶¶ 14-15.

¹⁷ In seeking comment on the NCC Report, the Commission proposed to revise Section 90.547 to provide, "Subscriber units designed for data-only applications are not required to have voice capability. Subscriber units designed for voice-only applications are not required to have data transmission capability." *Fourth Notice*, 15 FCC Rcd at 16932 App. B. In light of this proposal, Dataradio seeks reconsideration of the *Waiver Order* only to the extent that it relates to data-only radio systems. Petition at 2.

¹⁸ See *Letter* to Thomas Sugrue, Esq., Chief, Wireless Telecommunications Bureau, from Robert J. Speidel, Esq., Manager, Regulatory Policy (Jan. 24, 2001) ("Com-Net Ericsson Comments"). No other party filed comments regarding Dataradio's Petition.

¹⁹ Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010; Establishment of Rules and Requirements of Priority

the Project 25 Phase I (Project 25) data interoperability standard and observed that most parties filing comments in response to the *Fourth Notice* believed that adoption of this standard was appropriate.²⁰ While noting Dataradio's opposition to the NCC's Project 25 recommendation, the Commission explained its reasoning for finding that Project 25 was the appropriate data interoperability standard.²¹

7. *Discussion.* In requesting reconsideration of the *Waiver Order*, Dataradio raises two main arguments. First, it contends that the denial of its waiver request contravenes both the Congressional mandate concerning the commencement of the licensing of the public safety 700 MHz band spectrum and the Commission's rules.²² In support thereto, Com-Net Ericsson states that granting the waiver would augment the main goal underlying allocation of the 700 MHz band as public safety spectrum and would not impede the secondary objective of achieving data interoperability.²³ Second, Dataradio argues that the interoperability standard proposed in the *Fourth Notice* is procedurally defective and substantively inadequate, and should not be relied upon to foreclose a grant of its waiver request.²⁴

8. With regard to Dataradio's first argument, Dataradio maintains that the paramount policy consideration in WT Docket No. 96-86 is the release and assignment of the 700 MHz band to meet immediate public safety communications requirements.²⁵ Dataradio asserts that granting the waiver request will help achieve this goal. Similarly, Dataradio asserts that the policy goals underpinning the need for voice interoperability are different from those pertaining to data-only systems.²⁶ We find these arguments to be without merit. The paramount policy consideration in the 700 MHz band proceeding is to promote the efficient and effective use of the spectrum in an effort to meet the present and future public safety communications needs.²⁷ We believe that this consideration applies equally to interoperability (both voice and data) and data-only systems. The Commission, in the *Fourth Report*, specifically adopted and identified two interoperability channels for data transmission,²⁸ and adopted the data interoperability standard incorporated in the Project 25 suite of standards.²⁹ As a result, it is apparent that the Commission sought to ensure that its policy goals regarding interoperability be met not

Access Service, *Fourth Report and Order and Fifth Notice of Proposed Rule Making*, WT Docket No. 96-86, 16 FCC Rcd 2020 (2001) ("*Fourth Report*").

²⁰ *Id.* at 2051 ¶ 86.

²¹ *Id.* at 2051-52 ¶¶ 86-89. We note that Dataradio did not request reconsideration of the Commission's decision.

²² Petition at 5.

²³ Com-Net Ericsson Comments at 1-2.

²⁴ Petition at 7.

²⁵ *Id.* at 7.

²⁶ *Id.* at 6.

²⁷ *First Report*, 14 FCC Rcd at 156 ¶ 7, 164 ¶ 16.

²⁸ *Fourth Report*, 16 FCC Rcd at 2050-51 ¶ 85.

²⁹ *Id.* at 2051 ¶ 86.

only with respect to voice transmissions but also for data-only systems. Thus, we concur with the Division's conclusion that grant of Dartaradio's request could impede the Commission's interoperability goals. Further, Dataradio has not demonstrated that the Commission's goals would not be impeded by grant of its request.

9. In addition, we disagree with Dataradio's argument that denying its waiver request goes against the Congressional mandate to begin licensing the 700 MHz band to meet immediate public safety communications requirements.³⁰ Congress required the Commission to "commence assignment of licenses" for this spectrum by September 30, 1998.³¹ The Commission fulfilled this mandate. The service rules it adopted in the *First Report* gave effect to each provision of the statutory definition of public safety services for which the spectrum was allocated, in order to begin licensing expeditiously and with minimal information submission requirements or similar regulatory burdens.³² In particular, the *First Report* permitted, *e.g.*, Regional Planning Committees for the 700 MHz public safety band to convene and commence working on plans concurrent with the effective date of the *First Report*.³³ As a result, we are unpersuaded that denying the waiver request is at odds with the Congressional mandate.

10. Dataradio also argues that Section 90.547 of the Commission's Rules requires only that, once a valid standard is adopted, all data-only radios must comply with the standard.³⁴ In the interim, it contends that the rule should not effectively deny access to the General Use data channels.³⁵ We disagree. Section 90.547 requires that mobile and portable transmitters designed pursuant to standards adopted by the NCC to operate on the 700 MHz band must be capable of operating on any of the designated nationwide narrowband Interoperability channels approved by the Commission.³⁶ Under the Commission's rules, only equipment that complies with the interoperability standard the Commission adopts may be used on these channels.³⁷ Therefore, equipment that precedes the adoption of the standard is prohibited by Section 90.547, because it does not meet the requirements for operation on the interoperability channels. Moreover, given that the Commission has in fact adopted a standard, we believe that Dataradio's concern about a long lapse in time between there being an applicable standard has not come to fruition. Thus, we no longer see this concern as a strong basis for granting the requested relief.

11. With regard to Dataradio's second argument, Dataradio asserts that the NCC's recommended data interoperability standard was adopted by the NCC in violation of the procedural due process

³⁰ Petition at 4-5.

³¹ See 47 U.S.C. § 337(b).

³² *First Report*, 14 FCC Rcd at 155 ¶ 3.

³³ See generally *id.* at 190-96 ¶¶ 77-89.

³⁴ Petition at 6.

³⁵ *Id.*

³⁶ 47 C.F.R. § 90.547.

³⁷ *Id.*

requirements of the FACA.³⁸ It thus contends that it would be unlawful for the Commission to adopt such data standard.³⁹ Dataradio further contends that Project 25 should not be the data interoperability standard and, therefore should not preclude grant of its request for waiver.⁴⁰

12. We do not find these arguments to be persuasive. In its comments to the *Fourth Notice*, Dataradio contested both the procedural and substantive adequacy of the NCC's decision to adopt the Project 25 standard.⁴¹ The Commission did not find Dataradio's arguments persuasive, and ultimately adopted the proposed standard in the *Fourth Report*.⁴² We will not, in this waiver request proceeding, entertain a collateral attack on the Commission's decision. The appropriate avenue to pursue these issues further was to seek reconsideration of the *Fourth Report*. Dataradio did not do so, and may not do so here.⁴³ Thus, to the extent Dataradio seeks to revisit the Commission's decisions in the *Fourth Report* in WT Docket No. 96-86, we dismiss its Petition as moot given that the Commission has already addressed the matter and Dataradio did not submit a timely petition for reconsideration.

13. In sum, we conclude that both the *Waiver Order*, which correctly found that Dataradio did not make the requisite showing under Section 1.925(b) for waiver of Section 90.547, and the Commission's actions taken in its *Fourth Report*, together warrant denial of Dataradio's Petition.

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by Dataradio Corporation on December 14, 2000 IS DENIED.

³⁸ See Petition at 8. Specifically, it argues that the NCC did not address data transmission on the narrowband channels at its January 14, 2000, meeting but two weeks later, at its January 28, 2000, meeting, and that the NCC adopted the Project 25 data standard without prior notice on any public agenda or opportunity for public discussion or debate.

³⁹ *Id.* (citing *Alabama-Tombigee Rivers v. Dept. of Interior*, 26 F.3d 1103 (1994)).

⁴⁰ Petition at 9-10. Specifically, it asserts that (a) Project 25 is an air interface that does not allow for communications between users without associated applications; (b) because the NCC did not address software applications, software obtained by Public Safety users from different sources will be incompatible, and interoperable communications will lead to confusion and potential harm to public safety users; and (c) it is unlikely state-of-the-art applications will be written to operate on Project 25 standard because it is obsolete for data communications as it uses only a 9600 baud rate. *Id.* at 9.

⁴¹ See, e.g., Dataradio Comments (WT Docket No. 96-86) at 6-7.

⁴² *Fourth Report*, 16 FCC Rcd at 2052 ¶ 89.

⁴³ See, e.g., *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, *Memorandum Opinion and Order*, 5 FCC Rcd 216 ¶ 41, n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* *Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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